State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
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March 19, 1984

A-740

The Honorable Justices of the
United States Supreme Court
United States Supreme Court Building
Washington, D.C. 20543

Attention: Ms. Katherine Downs
Assistant Clerk

Re: Karcher v. Daggett, Motion for Stay Pending Final Disposition of Appeal, Docket No. A-740

Dear Honorable Justices:

This letter is being submitted on behalf of the State defendants (Thomas H. Kean, Governor, etc., et al.) in reply to the motion of defendants-intervenors to stay the Orders of the three-judge panel entered on February 17, 1984 (as corrected by further Order entered on March 5, 1984) imposing a plan for the election of members to the House of Representatives in New Jersey for the 1984 elections.

Intervenors, as they did before the District Court, continue to characterize the relief they request as a motion for stay. However, if a stay were their true goal, the granting of that relief will leave no plan in place (since the Feldman Plan was

declared unconstitutional by this Court and its use has been permanently enjoined) and would require statewide at-large elections. 2 U.S.C. §2(a). Accordingly, intervenors' request of this Court is not a stay of the Orders of the three-judge panel, but the selection in summary fashion of an alternative plan from among three (really two, see discussion infra) alternatives proposed by intervenors. It is thus apparent that intervenors' motion to stay is in actuality a motion for summary reversal.

Intervenors suggest three alternative redistricting proposals--Plan A (Lynch Plan), Plan B and Plan C. It is important to note that Plan C was never before the three-judge panel for consideration; although it was marked for identification, the panel refused to accept same because it was not timely submitted in accordance with prior orders. As admitted by intervenors, that plan was not in "corrected" form until February 15, 1984, a full week after the hearing had concluded in this matter. Nor can intervenors claim to have been prejudiced by what they assert was a "hastily" scheduled hearing. That date had been set and agreed to by all the parties in a meeting with the district court on December 19, 1983. All of the parties were fully aware that the panel would fulfill its own responsibilities to act in the event the State Legislature was unable to produce a fair congressional redistricting plan that satisfied the constitutional criteria articulated by

this Court by February 3, 1984. When the Legislature did not act by February 3, the three-judge panel properly began its deliberations in this matter. Therefore, appellants' argument that the court below usurped the legislative authority of the State Legislature is wholly without support. The court below intervened only because of the failure of the State Legislature to adopt a redistricting plan that was both constitutional and fair.

Appellants also argue that the two decisions of this Court -- Upham v. Seamon, 456 U.S. 37 (1982) and White v. Weiser, 412 U.S. 783 (1973)--compelled the court below to adopt either Plan A (Lynch Plan) or one of its variants, i.e., Plan B or Plan C (which as noted was submitted out-of-time to the court below). Appellants cite those cases in support of their theory that the three-judge court lacked discretion to select any plan but one based on the unconstitutional Feldman Plan so long as the single constitutional defect of excessive population deviation was cured. They argue further that Upham v. Seamon and White v. Weiser compelled the three-judge court to ignore other defects and to mechanically select one of their proposals as the basis for congressional redistricting notwithstanding the fact that it perpetuated the bizarrely shaped districts of the Feldman Plan on which it was based. Certainly, those cases do not require deference to an unconstitutional State statute which furthers no identifiable neutral State policy. In White v. Weiser, this Court gave consid-

eration to a prior State statute that furthered legitimate State goals. The Feldman Plan, which was intended to pit incumbent against incumbent and enhance one party's political advantage at the expense of the other, plainly did not further legitimate State goals but instead was designed solely to promote partisan political advantage.

In addition, this Court's decision in Upham v. Seamon also has no bearing here. In that case, which concerned a suit under the Voting Rights Act, the district court was held not to have the power to make changes in a total congressional redistricting plan when the Attorney General of the United States had only found constitutional defects in two districts. This Court's holding, therefore, stands simply for the proposition that in fashioning an interim measure under the Voting Rights Act, the district court's jurisdiction is limited to correcting the defects presented to it for review. This matter, however, involves neither an interim measure, nor a district court's limited jurisdiction under a Voting Rights Act challenge. The three-judge panel was charged with reviewing and evaluating proposed congressional district plans that will likely be in effect until the next census. For this reason, it was fully appropriate for it to scrutinize the plans presented to ensure the adoption of a plan that met applicable constitutional criteria as well as furthered significant legitimate secondary State goals of compactness and communities of interest.

The three-judge panel below undertook a careful scrutiny of several alternative congressional redistricting plans submitted to it by the parties to this action. In each case the parties had the opportunity to fully evaluate and test the merits of other plans submitted as well as justifying their own plans. This Court at this juncture should not now overturn that careful and deliberate consideration of the three-judge panel. In addition to this letter in opposition to appellants' request for stay, the State defendants also rely on the letter in opposition to stay submitted to the three-judge panel below as well as its brief and appendix in response to intervenors' arguments on the reach of the White v. Weiser and Upham v. Seamon cases, which was submitted to the three-judge panel.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL

Michael R. Cole
First Assistant Attorney General

MRC:fg
cc: All Counsel

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March 9, 1984

Honorable John J. Gibbons
United States Court of Appeals
for the Third Circuit
Post Office & Court House
Building
Newark, New Jersey 07101

Honorable Clarkson S. Fisher
Chief Judge
United States District Court
Post Office & Court House
Building
Newark, New Jersey 07101

Honorable Stanley S. Brotman
United States District Court
Post Office & United States
Court House
4th & Market Streets
P.O. Box 1029
Camden, New Jersey 08101

Re: Karcher v. Daggett
Civil Action Nos. 82-297 and 82-388

Dear Honorable Judges:

This letter is being submitted on behalf of the State defendants in reply to the motion by defendants-intervenors to stay the Orders of this Court entered on February 17 (correcting order entered on March 5, 1984) imposing a plan for the election of members to the House of Representatives. In addition to the stay -- and perhaps in recognition of the obvious fact that a stay will leave no plan in place and require at large elections, 2 U.S.C. §2(A) -- intervenors propose several alternative plans never before considered by the panel or by the parties, and ask the Court to adopt one of them. For the reasons set forth below, intervenors are plainly not entitled to a stay nor should they be permitted at this time to submit alternative proposals to the Forsythe Plan to the Court.

Intervenors' request for a stay should be denied because they are unable to establish that all of the prerequisites to such relief have been satisifed: (1) that irreparable injury

will result if relief is withheld; (2) that there is clear likelihood of success on the merits; (3) that upon balancing of the hardships, the harm to the moving party from denial of the restraints outweighs the damage to other parties if the relief sought is granted; and (4) that the public interest requires the issuance of such relief. Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 814-815 (3rd Cir. 1978); Ammond v. McGahn, 532 F.2d 325, 329 (3rd Cir. 1976); A.O. Smith Corp. v. F.T.C., 530 F.2d 515, 525 (3rd. Cir. 1976).

Intervenors make no allegations concerning irreparable harm. Nor have they identified with any particularity any harm whatsoever which they may imminently suffer if a stay is denied. They assert baldly that "[i]f no stay is granted and the judgment is reversed, the State of New Jersey will be put to considerable expense in gearing up to implement a plan which never goes into effect " (intervenors' motion at p. 4). Such alleged harm is not individual to the intervenors and thus cannot form the basis of a request for stay. In addition, that allegation is unsupportable. In actuality, the costs associated with running a congressional election exist no matter what configurations of districts are utilized. And, in any event, the expenditures of some monies on the printing of ballots that may not be used does not constitute irreparable injury. Further, as set forth below, the sole example of "irreparable harm" pointed to is premised on the wholly speculative notion that intervenors will prevail on their appeal to the United States Supreme Court.

Intervenors assert there is a clear likelihood they will prevail on the merits before the Supreme Court. Their position is unpersuasive, resting as it does simply on the premise that this Court lacked authority under the decision in White v. Weiser, 412 U.S. 783 (1973) to adopt a plan substantially different in composition from L.1982, c.1 which was declared unconstitutional by the Supreme Court. This argument has already been fully briefed and considered by the Court, which properly rejected it. See Slip Op, pp. 10 to 13. It is quite true as intervenors assert that all the "parties agree that intervenors' proposed plans are closer to P.L. 1982, c. 1, than any of the proposed alternatives." It is precisely for this reason that this Court rejected the Lynch Plan, noting that it owed "no deference to an unconstitutional state statute." Slip Op., p. 11. The Court did, however, select a congressional redistricting plan that had the lowest population deviation of all of the plans submitted to it for review, compact configurations and was not a product of partisan political gerrymandering. For these reasons, it is very likely that the adoption of that plan will be upheld on appeal, rather than reversed in favor of an admitted partisan gerrymander.

It is also plain that when there is a balancing of the hardships and consideration of the public interest, no stay should be granted. The public interest would be disserved if the Feldman Plan, or a congressional plan based on it , were imposed. As detailed in the briefs and in the Court's opinion, the Feldman Plan's purpose and effect were the promotion of partisan political considerations; this accounted for the bizarrely shaped districts which have held New Jersey up to understandable ridicule. Such districts break up communities of interests, alienate voters and undermine faith in the political system. The plan selected by this Court meets the constitutional criteria established by the Supreme Court as well as furthering legitimate secondary state goals. Accordingly, intervenors fail to meet the third and fourth tests for the granting of a stay.

In any event, the purpose of a stay is to maintain the status quo. Intervenors, however, seek to use their request for a stay as a springboard for the adoption of a new congressional redistricting plan. They really seek reconsideration of the Court's opinion under the guise of a stay request. See Fed. R. Civ. P. 59.*

Intervenors have no basis to argue for the adoption of an alternative plan. This Court's Order entered December 19, 1983 directed that any parties proposing congressional redistricting plans should submit same to the Court and to the other parties by February 3, 1984. Intervenors now ask this Court to consider several alternative proposals never properly submitted to the panel or to the parties. These alternative proposals, specifically Senate Bill 1329 (1984) and Senate Bill 1340 (1984), have not been scrutinized by the panel or the parties. There is no guarantee that either of those two plans meet applicable constitutional criteria** or furthers, better than the plan adopted by this Court, secondary legitimate State goals.

Intervenors further assert that the proceedings in this matter have resulted in "handcuffing the designated law-making agencies of the State " (intervenor's motion at p. 2). There is nothing in the Court's order which would prohibit the

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* This Court should not consider a Rule 59 Motion. First, it is out of time, not being brought within 10 days of the entry of the order complained of (Rule 59(d)). Second, defendants-intervenors having filed their notice of appeal to the Supreme Court on March 2, 1984, this Court is without jurisdiction to reconsider the merits of this controversy.

** This is particularly true in light of intervenor's admission that one plan they shought to have the Court accept out-of-time (which the Court declined to do) -- S1233 -- lacked contiguity of districts. (See Intervenor's Motion for Stay, P. 4).

Legislature from acting on proposed congressional redistricting plans. The fact is they have not done so. Moreover, any bill passed by the Legislature would also require gubernatorial review and action. Nor has that happened. At such time as a State law is validly adopted, it would be appropriate to return to this Court for clarification. Until there is a valid State law, any suggestion that the Legislature has been prohibited from acting is premature. It is only because of the complete inability and utter failure of the Legislature to adopt a fair congressional redistricting plan that this Court has been forced to involve itself in this matter.

Lastly, intervenors again raise the prospect of a settlement agreement. No deference is owed to such discussions. The parties had the opportunity to present that plan to the Court for consideration along with all other plans. The Court selected a plan that is fair to all of the citizens of the State; a settlement plan would be nothing more than the product of an agreement among 14 individuals and is deserving of no great weight. In any event, intervenors are factually incorrect when they assert that all of the congressional parties have agreed to a compromise;* we are advised Congressman Courter has not so agreed.

In summary, a stay of the congressional redistricting plan imposed by this Court should be denied. If a stay were granted, the result would be to impose at-large elections. Nor should the Court permit the request for a stay to be turned into a proceeding for reconsideration of the Court's earlier opinion, and the relief granted thereto.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey

Michael R. Cole
First Assistant Attorney General

MRC:km

cc: All Counsel

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* The State defendants certainly made no such agreement.

A-140

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GEORGE T. DAGGETT,	:	
Plaintiff,	:	Hon. John Gibbons Hon. Clarkson S. Fisher Hon. Stanley S. Brotman
v.	:	
IRWIN I. KIMMELMAN, et al.,	:	
Defendants,	:	Civil Action No. 82-297
and	:	and Civil Action No. 82-388
EDWIN B. FORSYTHE, et al.,	:	
Plaintiffs,	:	
v.	:	
THOMAS H. KEAN, as Governor of the State of New Jersey, et al.,	:	
Defendants.	:	
JAMES J. FLORIO, et al.,	:	
Intervenors.	:	

BRIEF AND APPENDIX ON BEHALF OF STATE DEFENDANTS IN REPLY TO PROPOSED CONGRESSIONAL REAPPORTIONMENT PLANS

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

This matter is before the court pursuant to its Order on Mandate entered December 19, 1983, which permitted the submission of proposed congressional reapportionment plans by the parties to this litigation in the event that a constitutional plan was not duly adopted by the Legislature and Governor of the State of New Jersey by February 3, 1984. Since no such plan has been duly adopted by the State of New Jersey, on February 3, 1984, these defendants proposed that this court adopt Senate Bill 1111 (Da5 to Da13*), otherwise known as the Hagedorn plan, or, alternatively, the Zimmer plan (Assembly Bill 839; Da22 to Da30), while plaintiffs Edwin B. Forsythe, et al. (hereafter referred to as "Plaintiffs") proposed the adoption of an independently formulated plan, and intervenors James J. Florio, et al. (hereafter referred to as "Intervenors") urged that this court adopt Senate Bill 10 (Da14 to Da21) as the reapportionment plan for this State.

Defendants urge that this court reject the suggestion of Intervenors that it formulate its congressional reapportionment plan on the basis of Senate Bill 10.

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* "Db" and "Da" refer to defendants' brief and appendix, respectively, filed in support of their proposed plan. Similarly, "Drb" and "Dra" refer, respectively, to the brief and appendix filed herewith in reply to the other proposed plans.

ARGUMENT

THIS COURT SHOULD REJECT SENATE BILL 10 AS A BASIS FOR THE REAPPORTIONMENT OF NEW JERSEY CONGRESSIONAL DISTRICTS BECAUSE OTHER PROPOSED PLANS BEFORE THE COURT BETTER FULFILL THE CONSTITUTIONAL REQUIREMENT OF THE LOWEST POSSIBLE POPULATION DEVIATION AMONG DISTRICTS, AND BECAUSE THAT PLAN FURTHERS NO IDENTIFIABLE NEUTRAL STATE POLICY OBJECTIVES AND IS BASED UPON AN UNCONSTITUTIONAL PLAN WHICH WAS SPECIFICALLY DESIGNED TO FURTHER INVIDIOUSLY DISCRIMINATORY POLITICAL OBJECTIVES.

As set forth in the brief filed by these defendants in support of the their proposed congressional reapportionment plan, this court now faces the difficult judicial task of balancing the preeminent constitutional requirement that the plan which it adopt contain the lowest population deviation figures possible with legitimate non-constitutional State policy goals. Connor v. Finch, 431 U.S. 407, 415-18 (1977); Wise v. Lipscomb, 437 U.S. 535, 541 (1978); Carstens v. Lamm, 543 F. Supp. 68, 82-83 (D.Col. 1982). Moreover, it is also clear that any plan which this court might adopt must be held to "stricter standards" than a plan which might be legislatively adopted. Connor v. Finch, supra, 431 U.S. at 414.

Accordingly, this court must take special pains to ensure that the plan finally decided upon furthers neutral and legitimate interests of the community as a whole. Ibid.; see also Karcher v. Daggett, 103 S.Ct. 2653, 2670 (1983) (Stevens, J., concurring). Moreover, the Supreme Court has recognized that this court may appropriately reject a proposed plan with lower population deviation figures when another plan more fully accomplishes consistently applied neutral State policy objectives. Karcher v. Daggett, supra, 103 S.Ct. at 2364, n. 11, citing David v. Cahill, 342 F.

Supp. 463 (D.N.J. 1972); Connor v. Finch, supra, 431 U.S. at 420-21; Carstens v. Lamm, supra, 543 F. Supp. at 82.

In this case, Senate Bill 10 has a larger relative overall range* than that accomplished by Senate Bill 1111 which defendants have urged this court to adopt, and will be shown to further no legitimate, consistently applied State policy goals. Moreover, as argued below, the plan proposed by Senate Bill 10 is in fact based on a policy which is inimical to any rational characterization of a legitimate State interest, namely the attempt to gain partisan political advantage through gerrymandering. Accordingly, in the exercise of its equitable discretion, this court should reject Senate Bill 10 as a basis for the formulation of a congressional reapportionment plan for this State.

(a) Population Deviation Among Districts in Senate Bill 10.

As explained by the Supreme Court in Karcher v. Daggett, supra, Article I, §2 of the United States Constitution requires that congressional districts "be apportioned to achieve population equality as nearly as is practicable," and that a variation in population among districts in a redistricting plan may be accepted by the court only if it is "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 103 S.Ct. at 2658, quoting Wesberry v. Sanders, 376 U.S. 1, 18

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* Definition of the term "relative overall range" as used in this brief, as well as the terms "ideal average district population," "absolute mean deviation" and "relative mean deviation" used infra, are defined at Db6 to Db7.

1,18 (1964), & Kirkpatrick v. Preisler, 394 U.S. 526, 530, 535 (1969). In this case, Senate Bill 10 has an absolute range of 67 persons, for a relative overall range of 0.01273%. See Defendants' Exhibit H, attached to Affidavit of Harold Berkowitz (hereafter referred to as "Berkowitz Affidavit") previously filed herein. However, these figures are clearly inferior to those established by Senate Bill 1111, which has an absolute range of 0.01140%. Id. at Exhibit G. In addition, Senate Bill 10 fails to improve the absolute mean deviation of 11.50 persons or the relative mean deviation of 0.00218% established by the Hagedorn plan. Id. at Exhibits G & H.

As a result, this court may not accord Senate Bill 10 any serious consideration in its formulation of an appropriate congressional reapportionment plan unless it can be shown that it better achieves the relevant neutral State policy objectives which, as argued in defendants' prior brief, the Hagedorn plan clearly and straightforwardly achieves. Karcher v. Daggett, supra, 103 S.Ct. at 2664 n. 11; Connor v. Finch, supra, 431 U.S. at 420-21. However, as argued below, careful consideration of the redistricting plan proposed by Senate Bill 10 unequivocally demonstrates that it is designed to further no known neutral policy objectives, and that the prior unconstitutional plan upon which it is based is tainted by invidiously discriminatory political objectives.

(b) Non-Constitutional Criteria.

Senate Bill 10 is concededly merely a minor reformulation of L. 1982, c. 1, declared unconstitutional by the Supreme Court,

and has been changed only insofar as considered necessary to lower the population deviation figures which formed the basis of that Court's rejection of that enactment. See, Statement appended to Senate Bill 10 (Da18); Statement of Senator Lynch, Public Meeting of the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee on Congressional Redistricting, December 8, 1983 (hereafter referred to as "Public Meeting"), at 1 & 4, previously submitted as Exhibit in support of Intervenor's proposed plan. Since this proposed remedy is thus based upon a prior legislatively adopted plan, as instructed by the Supreme Court in White v. Weiser, 412 U.S. 783 (1973), this court's evaluation of Senate Bill 10 must begin with consideration of the public policy objectives sought to be furthered by L. 1982, c. 1, commonly known as the Feldman plan, the statute upon which it is based. Accordingly, this court may give special deference to Senate Bill 10 only if that evaluation demonstrates that the Feldman plan represented "a genuine effort, untainted by any suspect or invidious motives." Doulin v. White, 535 F. Supp. 450, 453 (E.D. Ark. 1982).

To do otherwise -- to blindly assume that the Feldman plan served legitimate State policies as Intervenors argue this court should do -- would frustrate rather than advance the goals to be fostered by the reapportionment process. A close examination of the policies underlying the Feldman plan, with its "bizarrely" shaped districts, will show that it furthers few legitimate State objectives for redistricting and indeed dues violence to most. In such circumstances, adherence to Intervenors simplistic (and we

submit, wrong) reading of White v. Weiser would work the very result cautioned against by Justice Stevens in his concurring opinion in Karcher v. Daggett, supra, 103 S.C. at 2677-77:

> If population equality provides the only check on political gerrymandering, it would be virtually impossible to fashion a fair and effective remedy in a case like this. For if the shape of legislative districts is entirely unconstrained, the dominant majority could no doubt respond to an unfavorable judgment by providing an even more grotesque-appearing map that reflects acceptable numerical equality with even greater political inequality. If federal judges can prevent that consequence by taking a hard look at the shape of things to come in the remedy hearing, I believe they can also scrutinize the original map with sufficient care to determine whether distortions have any rational basis in neutral criteria. Otherwise, the promise of Baker v. Carr and Reynolds v. Sims -- that judicially manageable standards can assure 'full and effective participation by all citizens,' 379 U.S. at 5465 -- may never be fulfilled.

This is the very consequence Intervenors seek to work in this case; White v. Weisner properly construed requires no such result.

In White v. Weiser, the Supreme Court considered the propriety of the adoption by a three-judge panel of a congressional reapportionment plan "solely on the basis of population considerations," notwithstanding the fact that another proposed plan "achieved the goal of population equality to a greater extent" and "most clearly approximated the reapportionment plan of the State Legislature." That plan had previously been declared unconstitutional on the basis of population deviations, and was specifically designed "to preserve the constituencies of congressional incumbents" and to avoid contests among them. 412 U.S. at 791, 796. Noting that the formulation of districts in a manner which minimized contests be-

tween incumbents was a valid State policy, 412 U.S. at 797, quoting Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966), the Court held that "the District Court erred in so broadly brushing aside state apportionment policies without solid constitutional or equitable grounds for doing so." 412 U.S. at 797, quoting Whitcomb v. Chavis, 403 U.S. 124, 161 (1971). The Supreme Court accordingly concluded that the District Court abused its discretion in failing to defer to the legitimate State legislative policy objectives reflected in the proposed plan, as a minor reformulation of the prior enactment, without specifically setting forth any "good reason[s]" for failing to do so. 412 U.S. at 796-97.

The principle underlying White v. Weiser that deference to a proposed plan extends only to the extent the plan upon which it is based reflects legitimate State policy goals was explained by the court in Graves v. Barnes, 446 F. Supp. 560 (W.D. Tex. 1977). There, the court considered the contention that a particular proposed plan was "one deserving of indulgent review, by virtue of its purportedly legislative genesis," since it retained some districts of the prior reapportionment statute, while making only "minor changes" in the other districts. 446 F. Supp. at 563 (footnote omitted). Noting that "we of course recognize our duty to respect state apportionment policy," 446 F. Supp. at 563, citing White v. Weiser, supra, the court apparently considered it decisive that the prior legislative enactment had been subject to question earlier in the litigation on the ground that it fragmented minority voting strength. 446 F. Supp. at 563 & n.5; see 408 F. Supp. at 1051-52. In light of this fact, the court considered it "a unlikely argument

- to proclaim as virtue a kinship with that which was riddled with vice," and accordingly rejected the contention that "[t]his once-removed approximation of legislative intent [thereby] cloak[s] the present plan with the mantel of state policy, thereby [lending] it a preferred status over the plaintiffs' proposal." 446 F. Supp. at 563. As stated by the court:

> It is, therefore, only to the extent that the present plan demonstrates a legitimate state policy that it enjoys that privileged review which might have been presumptively accorded its predecessor [446 F. Supp. at 564 (emphasis in original).]

See also Terrazas v. Clements, 537 F. Supp. 514, 528, 537 (W.D. Tex. 1982).

It is thus apparent that, contrary to Intervenors' contention, White v. Weiser does not require that this court pay mechanical obeisance to the prior unconstitutional reapportionment plan, but instead requires that this court focus its attention on the underlying public policy objectives sought to be furthered by that statute.* In addition, as discussed below, the specific holding of Weiser also requires that this court decline to accord Senate Bill 10 any special deference since the Feldman plan upon which it is based was specifically designed to maximize the number of contests between Republican incumbents.

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*Moreover, contrary to Intervenors' contention, other District Courts have not "followed [the] lead" of their erroneous interpretation of White v. Weiser. See Intervenors' Brief in Support of Proposed Plan (hereafter referred to as "Ib"), at 4 n.3. As noted above, Doulin v. White, supra, specifically held that deference should be accorded a prior legislatively adopted plan only if that prior plan is free of any taint of suspect or invidious motives. 535 F. Supp. at 453. The citation by Intervenors of Shayer v.

(Footnote Continued On Following Page)

This conclusion is not altered by the Supreme Court's decision in Upham v. Seamon, 102 S.Ct. 1518 (1982). Intervenors rely on it for the proposition that the plan adopted by this court may not depart from the prior unconstitutional plan in the absence of a finding that other statutory or constitutional violations are implicated by the prior plan. See Ib3 to Ib4. Upham involved a challenge to a congressional reapportionment plan under the Voting Rights Act ("VRA"), 42 U.S.C. §1973c, on the ground that it was legally unenforceable because the United States Attorney General had failed to certify compliance with the VRA as to two specific districts in the reapportionment plan. 102 S.Ct. at 1519; Seamon v. Upham, 536 F. Supp. 931 (E.D. Tex. 1982), vacated and remanded 102 S.Ct. 1518 (1982). Concluding that the failure to obtain this "preclearance" as to these two districts rendered the entire plan a nullity, the District Court in formulating an interim reapportionment plan, altered the composition of other districts established by the statute in order to render the rest of the districts established by the statute more racially "fair." 102 S.Ct. at 1519-1520. In reversing the lower court's decision, the Supreme Court

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(Footnote Continued From Previous Page)

Kirkpatrick, 541 F. Supp. 922, 932 (W.D. Mo. 1982), aff'd 456 U.S. 966 (1982), Carstens v. Lamm, 543 F. Supp. 68 (D. Col. 1982), and O'Sullivan v. Brier, 540 F. Supp. 1200, 1202 (D. Kan. 1982), is similarly unsupportive of their contention since each of those cases involved the establishment of a court-formulated plan in the absence of any legislative reapportionment enactment following the decennial census. This court's decision in David v. Cahill, 342 F. Supp. 463 (D.N.J. 1972), cited at Ib4 for the same proposition, is also inapposite since that case, too, involved an otherwise valid redistricting statute which was simply rendered constitutionally "outmoded" as a result of the issuance of a new census. See 342 F. Supp. at 464-65; L. 1966, c. 183.

held that in adopting an interim plan to replace a reapportionment statute rendered legally unenforceable as a result of an Attorney General objection to certain districts, the District Court could alter only those particular districts in the absence of a specific finding that the composition of other districts otherwise violated the VRA, the Constitution or relevant statutory provisions. 102 S.Ct. at 1521-22.

Upham thus stands for a principle no broader than that an interim plan adopted by a District Court under the VRA may only reformulate those districts objected to by the Attorney General, in the absence of an adjudication as to other districts in the statutory plan. The subsequent District Court decisions which have applied Seamon have recognized its limited application to the formulation of interim plans under the VRA, and have noted that the Supreme Court's decision does not limit the District Court's authority to fully review constitutional and other public policy questions raised by the parties incident to the subsequent formulation by the court of a final redistricting plan. Burton v. Hobbie, 543 F. Supp. 235, 239 (M.D. La. 1982); Jordan v. Winter, 541 F. Supp. 1135, 1142-43 (N.D. Miss. 1982).

As noted in defendants' prior brief, the appropriate non-constitutional criteria include the extent to which Senate Bill 10 and the Feldman plan upon which it is based preserve municipal and county boundaries, the contiguity and relative compactness of the congressional districts which they establish, and whether those districts correspond with recognized communities of interest. Karcher v. Daggett, supra, 103 S.Ct. at 2663; David v. Cahill,

supra, 342 F. Supp. at 469-70; Skolnick v. State Electoral Board of Illinois, 336 F. Supp. 839 (N.D. Ill. 1971). Additional appropriate considerations include whether those districts avoid contests between incumbent congresspersons, Karcher v. Daggett, supra, 103 S.Ct. at 2663; White v. Weiser, supra, 412 U.S. at 791, and whether the Feldman plan and its progeny, Senate Bill 10, are fundamentally fair in their purpose and effect with respect to racial* or political groups. Ibid.; Carstens v. Lamm, supra, 543 F. Supp. at 81. Finally, in assessing these secondary considerations, the court should take a flexible approach depending upon "the importance of the State's interest [and] the consistency with which the plan as a whole reflects those interests ...." Karcher v. Daggett, supra, 103 S.Ct. at 2663.

The federal courts have attached "great importance to the preservation of county and municipal boundaries" in the formulation of congressional reapportionment plans, and have held that these governmental units should be split "only if absolutely necessary to maintain a constitutional population variance." O'Sullivan v. Brier, supra, 540 F. Supp. at 1203; see Karcher v. Daggett, supra, 103 S.Ct. at 2663; Gaffney v. Cummings, 412 U.S. 735, 742 (1973). A high priority has been given to this goal "because the sense of community derived from established governmental units tends to foster effective representation," Carstens v. Lamm, supra, 543 F. Supp. at 88, and because the unnecessary fracturing of these units would entail "innumerable administrative problems and additional

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*The relative racial fairness of Senate Bill 10 is discussed at Db14 to Db17, and will not be further addressed herein.

costs," as well as "confusion among voters" in the divided governmental units. Shayer v. Kirkpatrick, supra, 541 F. Supp. at 933.

In this case, neither Senate Bill 10 nor the Feldman plan upon which it is based splits municipalities,* but both plans divide the 21 counties of the State into 55 fragments. See Da1 to Da2; Karcher v. Daggett, supra, 103 S.Ct. at 2690 n.4 (Powell, J., dissenting). In light of the expressed State policy of using counties as a basic unit of governmental, judicial and law enforcement organization, see Db10, Senate Bill 10 and the Feldman plan upon which it is based must be rejected by this court as a legitimate expression of State public policy unless those plans sufficiently further other recognizable neutral public policy objectives to an extent sufficient to outweigh this defect in the plans which they establish. O'Sullivan v. Brier, supra, 540 F. Supp. at 1203-04.

The second factor to be considered is the shapes of the districts established by the Feldman plan in terms of their contiguity, relative compactness and the extent to which they correspond with readily identifiable communities of interest. A cursory glance at the map of the districts established by the Feldman plan "illustrates ... far better than words can describe" the fact that

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*It should be noted that Intervenors' "Plan B" does split municipalities in order to obtain purported absolute population deviation ranges of 25 persons. See Ib19. Since the absolute population deviation range of 60 persons accomplished by Senate Bill 1111, the Hagedorn plan, clearly constitutes a good-faith effort to accomplish absolute population equality, see Db6 to Db8; Karcher v. Daggett, supra, 103 S.Ct. at 2658, this court should decline to rely on this proposed plan since it thus fails to further the legitimate secondary criteria, discussed above, of preserving the integrity of these municipal governmental units.

the districts that plan establishes are "nothing more than ... artificial unit[s] divorced from, and indeed often in conflict with, the various communities [of interest] established in the State." Karcher v. Daggett, supra, 103 S.Ct. at 2689 (Powell, J., dissenting; footnote omitted); see Da2.

As set forth in the testimony of Assemblyman Richard A. Zimmer, the districts established by this plan sprawl across the State with no explicable correspondence to any community of interest. See Deposition of Richard A. Zimmer (February 4, 1984) (hereafter referred to as "Zimmer"), filed with the court herewith, at T40-2 to -7. This defect has not been remedied by the minor adjustments made in the Feldman plan by Senate Bill 10, either in its present form or in its incarnation in the prior session of the Legislature as Senate Bill 3564. See id.; Public Meeting, supra, at 8-9 (Statement of Senator Gerald Cardinale).* The districts established by the Feldman plan have thus been characterized as "uncouth" and "bizarre," 103 S.Ct. at 2676 (Stevens, J., concurring; footnotes omitted), and it has been noted that they do not suggest "any attempt to follow natural, historical, or local political boundaries." Id. at 2690 (Powell, J., dissenting). It has accordingly been observed that the quality of representation under these districts will of necessity suffer, since "the boundaries are

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*This to be compared with Senate Bill 1111, which remedies specific problems noted with the Feldman plan. See Public Hearing before the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee on Senate Bill 3784 [the version of Senate Bill 1111 considered by the prior session of the Legislature] (hereafter referred to as "Public Hearing") (December 15, 1983), at 6 (Testimony of Senator Donald T. DiFrancesco), previously submitted herein as Intervenors' Exhibit.

so artificial that they are likely to confound the congressmen themselves." Ibid.

As a result, the districts which the Feldman plan establishes present "little more than crazy quilts completely lacking in rationality [which] could be [rejected by this court] on that basis alone." Reynolds v. Simms, 377 U.S. 533, 568 (1964) (footnote omitted); see also 103 S.Ct. at 2669 (Stevens, J., concurring). No contrary evidence to justify these shapes on rational neutral criteria has been offered by Intervenors in these proceedings. This court must therefore conclude that the "strangely irregular" districts which it establishes do not constitute "an ordinary geographic redistricting measure even within the familiar abuses of gerrymandering," and should accordingly reject Senate Bill 10 which is based on, and substantially identical with, that plan. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). Although Senate Bill 10 does make some minor adjustments in the shapes of the Feldman districts, see Da3, Da14 to Da21, it does so only insofar as is necessary to eliminate the basis for the embarrassing characterizations of some of the districts in the prior plan,* and while other changes may have been made in an effort to reduce population deviation, there is evidence to suggest that some served decidedly

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*For example, Feldman District Thirteen has been criticized for extending from the outskirts of Camden to the suburbs of New York City, see 40 Cong. Q. 1190 (1982), cited at 103 S.Ct. 2676 n.31 (Stevens, J., concurring), while District Three has been characterized as "contiguous only for yachtsmen." Daggett v. Kimmelman, 535 F. Supp. 978, 984 (D.N.J. 1982) (Gibbons, C.J., dissenting), aff'd 103 S.Ct. 2653 (1983); Karcher v. Daggett, supra, 103 S.Ct. at 2677 n.33 (Stevens, J., concurring); id. at 2690 (Powell, J.,

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political purposes as well (Zimmer at T43-20 to T44-4; T44-5 to -13; T71-16 to -19; T71-23 to 72-14).

The failure of the Feldman plan to abide by the neutral principles of compactness and community of interest similarly collides, apparently by design, with the established principle that it is appropriate to formulate a plan which avoids contests between incumbents and does not require a congressperson to run in a district other than the one in which he or she resides. See Burns v. Richardson, supra, 384 U.S. at 89 n. 16; White v. Weiser, supra, 412 U.S. at 791. See Db12 to Db13. Senate Bill 10 similarly violates this principle since Congressman Rinaldo must still run outside his home district (he resides in the Twelfth but represents the Seventh), although Representatives Smith and Courter have apparently relocated as a direct consequence of the Feldman Plan. However, this court, in assessing the validity of the shape and character of the districts Senate Bill 10 establishes, must, under White v. Weiser, look to Feldman not solely to which for a deter-

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dissenting). Similarly, the Fifth District has been called "the Swan" as a result of the meandering arc it carves across the northwest portion of the State, while the likeness of the Fourth District has been compared with that of a "running back." 103 S.Ct. at 2676 & n.31 (Stevens, J., concurring). Senate Bill 10 accordingly added the northern-most municipalities of the Thirteenth District to adjacent District Three, thereby undercutting the characterization of the former district as stretching as far as "the New York suburbs," while also "shoring up" the tenuous contiguity of the Third District. The Lynch Plan also removed the "beak" of the Fifth District, thereby making it more difficult to compare its shape with that of a waterfoul, but is less successful with its alteration of the "running back" Fourth District, which now simply resembles instead a baseball batter winding up for a a swing. See Da3.

mination whether these neutral principles may have motivated the contorted districts established.

The Feldman plan clearly fails to honor neutral principles. District Five was carved out so as to include the hometowns of two incumbent Republican congresspersons, while the hometown of the Republican incumbent from the old Fourth District was placed in a different district held by a Democratic incumbent. In addition, the Feldman plan pitted an additional two Republican congresspersons against one another in the new Twelfth District. See Daggett v. Kimmelman, supra, 535 F. Supp. at 984 (Gibbons, C. J., dissenting); Karcher v. Daggett, supra, 103 S.Ct. at 2677 n. 33 (Stevens, J. concurring); id. at 2690 (Powell, J., dissenting); Defendants' Exhibit O, Affidavit of George W. Bloom, previously submitted in support of defendants' proposed plan. Once again, the Feldman plan, upon which Intervenors rely in urging this court to accept Senate Bill 10, fails to affirmatively further these neutral policies and, instead, does violence to any reasonable understanding of the purposes these principles are intended to accomplish. Moreover, the full impact of the Feldman plan's departure from these particular criteria can only be appreciated in the context of the larger question of the fundamental political fairness of that plan.

It is well-established that in devising a reapportionment plan a court should consider the political fairness of proposed plans in terms of their effect on major political parties. See In re Illinois Congressional Districts Reapportionment Cases, No. 81-C-3915 (N.D. Ill. 1981), aff'd sub. nom. Ryan v. Otto, 454 U.S.

1130 (1982), at 19-22 (Da57 to Da60). Application of this principle in this context is consistent with the holding of the Supreme Court that a legislatively enacted plan may properly be designed to insure "political fairness," Gaffney v. Cummings, supra, 412 U.S. at 752, and the further admonition of that Court against "the danger of apportionment structures that contain a built-in bias tending to favor particular geographic or political interests." Abate v. Mundt, 403 U.S. 182, 186 (1971). Accordingly, in order to determine whether this court should, as Intervenors urge, defer to Senate Bill 10 as a reflection of the legislative judgment contained in L. 1982, c. 1, this court must insure that the reapportionment plan upon which the Lynch Bill is based is not designed merely "to solidify their own partisan electoral support." Skolnick v. State Electoral Board of Illinois, supra, 336 F. Supp. at 844; see White v. Weiser, supra, 412 U.S. at 791, 797.

This is true notwithstanding the fact that Feldman, if it were presently before this court as a legislative enactment, might not, under existing law, be considered an unconstitutional gerrymander. Although the Supreme Court has frequently stated in dicta that a reapportionment scheme which operates to "minimize or cancel" the voting strength of recognized political elements of the voting population might be considered unconstitutional in certain circumstances, see, e.g., Fortson v. Dorsey, 379 U.S. 433, 439 (1965), it has declined in the past to squarely address the constitutionality of alleged gerrymanders. See, e.g., Wells v. Rockefeller, 394 U.S. 540, 544 (1969). However, in light of the "stricter standards" applicable to court-imposed plans, see Connor

v. Finch, supra, 431 U.S. at 414-15, this court is not obliged to 'pick at random' from the proposed plans even though none may fall to the constitutional scrutiny applicable to legis lative enactments. See Wise v. Lipscomb, 437 U.S. 535, 540-41 (1978).

This principle was explained by the court in Dunnell v. Austin, 344 F. Supp. 210 (E.D. Mich. 1972), in which plaintiffs contended that their proposed plan should be adopted by the court to replace the prior redistricting statute, which was rendered unconstitutional by the issuance of a new decennial census, simply because that proposed plan contained population deviation figures which were "constitutionally defensible." 344 F. Supp. at 215. In rejecting this contention, the opinion noted that "The court's present remedial responsibility is not to review for constitutionality a plan which a legislature has previously enacted ... but rather, to adopt a plan from amongst several competing proposals when a legislature has failed to act." Ibid. The court therefore adopted an alternative proposal which, like the Hagedorn plan proposed by State defendants, "not only is clearly superior relative to a population standard, but also satisfies secondary criteria which would appear reasonably appropriate to a sound plan of redistricting." Ibid.

It is thus irrelevant for purposes of this court's remedial task that, as contended by Intervenors, the Daggett court declined to adjudicate the challenge to the original statute on a gerrymandering basis, or that the Court summarily affirmed the finding of a District Court that a reapportionment statute was not an unconstitutional gerrymander simply because it divided a prev-

iously single-district county among three congressional districts in a manner which enhanced the political strength of the majority party in one of the State's 23 congressional districts.* See Ib7 to 8, citing In re Pennsylvania Congressional Districts Reapportionment Cases, 567 F. Supp. 1507, 1517 (M.D. Pa. 1982), aff'd 103 S.Ct. 3564 (1983).

In this case, it is clear that the Feldman plan upon which Senate Bill 10 is based fails to fulfill any appropriate standard of political fairness, and instead satisfies the classic definition of a gerrymander as a "deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes" articulated by Justice Fortas in his concurring opinion in Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969). Although this court should not be expected to shoulder

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*In this regard, it should be noted that the further allegation of Intervenors that only two of the seven Justices in Karcher v. Daggett considered "any issue of gerrymandering in the case" (Ib7) is similarly based upon the misconception that any discussion of gerrymandering therein is relevant to this case only insofar as the authors of the various opinions considered the issue directly relevant to adjudication of the constitutionality of the statute before the Court. Thus, although the dissenting opinion of Justice White, which was joined by Chief Justice Burger and Justices Powell and Rehnquist, concluded that the population deviation figures contained in the statute did not render it unconstitutional, that opinion expressly states that this conclusion would be different "if appellees could demonstrate that New Jersey's plan invidiously discriminated against a racial or political group." 103 S.Ct. at 2653-2687. However, Justice White declined to reach the issue only because, as presented by the parties, the "issue [is not] before us." Id. at 2687. What is therefore significant for purposes of this court's remedial task is thus not the fact that only two Justices were prepared to address the gerrymandering question in the Daggett challenge, but rather the fact that a majority of five Justices agreed as to the general standards for identifying an unfair gerrymander. This court may, of course, turn to these discussions in formulating its own plan.

the "impossible task of extirpating politics" from the reapportionment process, this court may reasonably be expected to withhold its imprimatur from a proposal which is based upon an unconstitutional statute clearly designed to "minimize or eliminate the political strength of any group or political party." Gaffney v. Cumings, supra, 412 U.S. at 754; see also White v. Regester, 412 U.S. 755, 765 (1973); Whitcomb v. Chavis, 403 U.S. 124, 144 (1971); Burns v. Richardson, supra, 384 U.S. at 89; Carstens v. Lamm, supra, 543 F. Supp. at 81.

Precisely such an invidiously discriminatory political animus is apparent from the legislative history of L. 1982, c. 1 upon which Senate Bill 10 is based. As stated by then-Speaker of the Assembly Christopher Jackman during the period of consideration of the statute in question, "We're [i.e., the Democratic Party] in power and we'll draw the lines.... What's wrong with that? They [the Republicans] drew the lines 10 years ago and now it's our turn."* See Courier-Post, June 19, 1981, previously submitted as Defendants' Exhibit J.** This gerrymandering purpose was reiterated in the now-famous 'Reock letter,' described as "remarkable" and "disedifying," see 103 S.Ct. at 2677 and n.33[j] 537 F. Supp.

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*As this court is well aware, however, the lines drawn "10 years ago" were established by this court in David v. Cahill, although apparently based upon a Republican legislative proposal. See 342 F. Supp. at 467, 469.

**Defendants rely on their Memorandum of Law previously filed herein in support of the admissibility of this and other reported statements concerning legislative enactments made by State legislators.

at 984, in which Speaker Jackman elaborated on this "harshly partisan" theme. See 537 F. Supp. at 989-93.

In addition, Assemblyman Jackman justified the refusal of his Party to confer with Republican leaders concerning reapportionment plans on the basis that "the Republicans didn't invite me ten years ago when they were in the majority. They drew up a plan and gave it to us Democrats like I'm going to give it to them." Newark Star Ledger, June 23, 1981, Defendants' Exhibit K. Furthermore, then-President pro tem of the Senate Matthew Feldman, namesake of the reapportionment plan ultimately adopted, similarly expressed the view that "we are just balancing the mischief the Republicans are up to in other States," and boasted that his Party "used all that science can give us" in order to arrive at "a map that assures the re-election of all our Democratic incumbents, and [which] gives us a fighting chance with some other seats." New York Times, January 26, 1982, Defendants' Exhibit N.

The effectuation of this intent with a vengeance is clear when one considers the manner with which the Feldman plan delineated the State's new congressional districts. The Ninth District may fairly be characterized as the linchpin of this partisan pogrom. That district had theretofore been represented by a Republican incumbent, who had prevailed in the prior election by approximately 40,000 votes out of approximately 190,000 votes cast. See Defendants' Exhibit B, attached to Berkowitz Affidavit. As noted in the testimony of Assemblyman Richard Zimmer,* the drafters of the

*Assemblyman Zimmer is a practicing attorney who is presently serving his second term as a member of the New Jersey General
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Feldman Ninth District Plan attacked this partisan "problem" through the addition of strongly Democratic municipalities from Bergen County, while simultaneously eliminating Republican strongholds by shifting them into the already overwhelmingly Republican Fifth District (Zimmer at T38-3 to-10). It was noted that the Feldman plan thus removed 18 towns from the Ninth District which had in 1980 contributed a margin of 22,008 for the Republican candidate, while at the same time adding 19 towns which in 1980 had contributed a Democratic plurality of 1,789 votes (Zimmer at T39-20 to T40-1); see State Defendants' Deposition Exhibit 1 (Dra1 to Dra2).

Although the partisan evisceration of this district may not seem significant when considered in isolation, it set in motion a series of consistently applied efforts which appear, in retrospect, to have been clearly designed to cancel or minimize the otherwise legitimate electoral strength of the Republican Party. Thus, the Feldman Fifth District, which had been used as a "dumping

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Assembly (Zimmer at T6-17 to-24; T6-15 to-16). As a member of the Assembly, he serves on the State Government Committee which has jurisdiction over proposed congressional reapportionment legislation (Zimmer at T10-12 to-18). Prior to serving in the General Assembly, Mr. Zimmer served as Chairman of the New Jersey Common Clause and was a member of that organization's national Board (Zimmer at T7-5 to-12). While serving on that Board, his responsibilities included the evaluation of proposed redistricting reform measures (Zimmer at T16-15 to T17-12; T24-4 to-13). Mr. Zimmer has authored several articles analyzing the voting patterns of this State (Zimmer at T14-8 to T15-21), and has a thorough professional knowledge of the State's demographic composition and voting history (Zimmer at T7-13 to T8-9; T9-6 to T10-6).

ground" for Republican votes from the prior Ninth District, was also artfully crafted to include the hometowns of two Republican incumbents, thus requiring that they either run against one another in the ensuing election, move, or run for election outside of their district of residence. See L. 1982, c. 1; Defendants' Exhibit O, Affidavit of George W. Bloom. The brazen lack of subtlety with which this was accomplished is clear from the 'artificial appendage' of the Fifth District, which swoops down (inside the 'neck' of the 'swan') to encompass the hometown of incumbent Republican Congressman James Courter. See L. 1982, c.1; Da2; Defendants' Exhibit O, Affidavit of George W. Bloom; Zimmer at T30-7to -16 & T77-18 to T78-7; Daggett vs. Kimmelman, supra, 535 F. Supp. at 984 (Gibbons, C.J., dissenting); Karcher v. Daggett, supra, 103 S.Ct. at 2677 n.37 (Stevens, J., concurring); id. at 2690; Powell, J., dissenting).

Although, of course at least two incumbent congresspersons would be forced to reside in the same congressional district as a result of the reduction of the State's congressional delegation, the proponents of the Feldman plan were not satisfied simply with the result that both of the unlucky incumbent congresspersons be Republicans, but instead placed an additional two Republican incumbent congresspersons in the new Twelfth District. See L. 1982, c. 1; Defendants' Exhibit O, Affidavit of George W. Bloom; Zimmer at T30-17 to T31-6. This premeditated pairing of four incumbent congresspersons of one party is, of course, directly contrary to the legitimate policy in the formulation of reapportionments plans of avoiding unnecessary contests among incumbents.

White v. Weiser, supra, 412 U.S. at 791; Skolnick v. State Electoral Board of Illinois, supra, 336 F. Supp. at 843. Moreover, by aggregating disparate but strongly Republican communities around the largely intact Union County core of the highly-popular Republican incumbent of the old Twelfth District (See Defendants' Exhibit B, attached to Berkowitz Affidavit), the structuring of this district, in conjunction with that of the Fifth, clearly appears to have been intended to effectively 'balkanize' what was considered to be an irremediably Republican portion of the State. The strategy was obviously to frustrate the potentially troublesome congressional aspirations of prominent Republican figures from the Republican constituencies which were fragmented, while at the same time ensuring the political demise of at least two Republican congresspersons through the pairing of Republican incumbents in both districts. See Zimmer at T30-11 to T32-3; compare Map of David v. Cahill Plan (Da1) with Map of Feldman Plan (Da2).

However, the surgical precision with which the Feldman plan was partisanly drafted is most apparent in the new Third and Fourth Districts. Recognizing that the Democratic incumbent in the Third District was clearly threatened by the aspirations of Republican Assemblywoman Marie S. Muhler, over whom that incumbent had prevailed in 1980 by barely 2,000 votes out of more than 200,000 cast (see Defendants' Exhibit B, attached Berkowitz, Affidavit), the drafters of the Feldman plan took a straightforward approach to neutralizing the Republican upstart: they simply deleted her State legislative district, previously totally incompassed by the old Third District, pratically in toto from the new Third District

(Zimmer at T32-21 to T33-13). In thus 'gutting' the old Third District of its heavily Republican municipalities (which were unceremoniously dumped - in a manner similar to that used in fashioning the new Fifth and Twelfth Districts - in the already overwhelmingly Republican Thirteenth District), while retaining the incumbent Democrats' strongest coastline municipalities, the new district also transferred Assemblywoman Muhler's hometown to the new Seventh District (Zimmer at T32-10 to -20; T37-6 to -19; T80-3 to -9). The apparent motivating factor behind this maneuver was to insure that, in order to compete in the Third District, Assemblywoman Muhler would have to run outside of her district of residence with virtually none of her constituency base -- a set of circumstances which would be severely disabling in any election (Zimmer at T37-16 to T38-2).*

However, this inversion of neutral reapportionment principles in the fashioning of the new District Three did not stop there. Added to that district was the hometown of the Republican incumbent from the old Fourth District, who had been elected for the first time in 1980 in an upset victory in the wake of the indictment of the incumbent Democratic Congressman (Zimmer at T41-12 to -25; T42-1 -4). As a result, this displaced incumbent Republican found himself both removed from his demonstrated electoral stronghold in the south of the old district (see Defendants'

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*The adverse effect of this invidious reapportionment was apparent in the 1982 congressional election, in which Assemblywoman Muhler lost to the Democratic incumbent by more than 43,000 votes, as compared with her narrow defeat by approximately 2,000 votes in 1980. See Defendants' Exhibit C, attached to Berkowitz Affidavit.

Exhibit A, attached to Berkowitz Affidavit), and placed in a district in which he had no constituency base other than his hometown (Zimmer at T31-25 to T32-5). To further discourage this incumbent Republican from running, outside his district of residence, in the new Fourth District, the Feldman plan excised predominantly Republican municipalities in the Burlington County portion of the district and replaced them with strongly Democratic towns (Zimmer at T41-19 to -25). This alteration of the old district also appeared calculated to satisfy the congressional aspirations of a prominent Democratic State Senator by providing him with an 'open' district (Zimmer at T31-25 to T32-5).

What remained of the shredded remnants of the State was left with the dubious distinction of being designated the new Seventh District, otherwise known as 'the fishhook.' See Zimmer at T30-4; Karcher v. Daggett, supra, 103 S.Ct. at 2676 (Stevens, J., concurring), citing 40 Cong. Q at 1194-95 (1982). Comprising, in part, municipalities from the old Twelfth District, where the Republican incumbent was presumably intended to be 'enticed' to the Twelfth District, the new Seventh District appears to have been intended to create another 'open' Democratic district out of one which might otherwise elect a Republican on the basis of the enormous personal appeal of that incumbent (Zimmer at T31-12 to -31).

Thus, it may fairly be said that the Feldman plan was designed as an attempt to preserve existing solidly-Democratic districts and solidify that Party's more marginal districts, while either neutralizing Republican incumbents through displacement from their constituencies, or relegating them to political oblivion

through the internecine Party warfare encouraged through the pairing of Republican incumbents in the new Fifth and Twelfth Districts.

Intervenors nevertheless suggest that the Feldman plan upon which Senate Bill 10 is based must be considered "fair" because, as a result of a fortuitous combination of events, not all of these invidiously partisan objectives were accomplished. However, any "fairness" which might be found in the results of the ensuing 1982 congressional election on this basis must be ascribed to the singleminded resourcefulness of the hard-pressed Republican incumbents, rather than to any neutral virtues intrinsic to the Feldman plan. Critical to this partial failure was the fact that the highly popular Republican incumbent from the old Twelfth District decided to nevertheless run in the 'fishhook' Seventh District, where he ultimately prevailed in the 1982 election, thus thwarting the attempted 'balkanization' of Republican electoral strength in the Central and Northern parts of the State (Zimmer at T79-3 to -9); see Defendants' Exhibit C, attached to Berkowitz affidavit. As a result when, subsequent to the enactment of Feldman, the other Republican incumbent who had been 'paired' in the new Twelfth District decided to run for the United States Senate, the Republican incumbent from the old Thirteenth District, who had been placed with a fourth Republican incumbent in the new Fifth District, was free to move to the Twelfth District, where he subsequently won election, without the prospect of facing a Republican primary opponent (Zimmer at T78-18 to -21).

With the premise of the Feldman plan's attempted gerrymander thus dislodged, the 'dominos' continued to fall in an unanticipated direction with the election of the sole Republican incumbent thus left in the Fifth District (Zimmer at T79-3 to -9). Moreover, the involuntary 'prodigal son' of the old Fourth District returned to his redrawn constituency to an electoral victory which must have similarly confounded the architects of the Feldman plan. See Defendants' Exhibit C, attached to Berkowitz Affidavit. Although the Feldman plan did successfully facilitate the vanquishment of the Republican incumbent in the Ninth District and the eclipse of the congressional aspirations of the previously-strong Republican opponent of the Third District Democratic incumbent, it is ironic that the fortuitous thwarting of similar politically invidious purposes directed at these other Republican incumbents should now be cited in support of the alleged "fairness" of the Feldman plan. See Affidavit of Thomas E. Mann, ¶¶ 10, 11, submitted by Intervenors in support of proposed plan.

This fortuitous turn of events thus renders meaningless any evaluation of the "fairness" of the Feldman plan or its clone, Senate Bill 10, on the basis of the results of the 1980 congressional election. However, it is equally irrelevant to rely on unrelated State-wide election data to support the contention that the districts these reapportionment plans establish are nevertheless fair. See Affidavit of Thomas Mann, ¶10. Specifically, Intervenors rely on election data from the 1980 Presidential election, 1981 gubernatorial election, and the 1982 United States Senate race aggregated according to the districts established by

Feldman and Senate Bill 10, and argue that the districts which those plans establish are demonstrably fair because the hypothetical results under those plans project Republican victories in 11 of the 14 districts under the 1980 results, 8 of the 14 districts under the 1981 results, and 6 out of the 14 districts under the 1982 results. Ibid.

However, as established by the testimony of Assemblyman Zimmer, use of such data neither supports nor undercuts the purported fairness of a proposed congressional apportionment plan, since the actual results in such district-specific elections are in large part determined by the personal appeal of the candidates and the extent to which the enjoy an established constituency base (Zimmer at T74-6 to -25; T76-7 to -10; T83-21 to -25; T92-8 to -13). Thus, looking at unrelated election data in isolation would, of necessity, underestimate the impact, for example, of forcing the conservative Republican incumbent from the old Fourth District to run for re-election in an area in which he is a political unknown, or which was previously represented by a liberal Republican (Zimmer at T74-15 to 20).

Moreover, use of data such as that derived from the 1980 presidential election further distorts any hypothetical results because its superimposes on the proposed districts the major influence of candidate personalities evident in that election (Zimmer at T87-18 to T88-2). The difficulty of assessing "fairness" of a reapportionment scheme is rendered still more problematical under the Feldman plan, since that redistricting scheme was not designed with such generalized election results in mind but instead, as

argued above, with an eye to the circumstances of specific incumbents and congressional aspirants (Zimmer at T91-4 to -8). With a plan such as Feldman, the critical factors are thus the overall intention and design of the plan, as reflected in the specific manipulation of individual districts and the established constituencies of the incumbents and challengers (Zimmer at T96-14 to 21; T97-7 to -16).

However, even if it is assumed that a reliable evaluation of the fairness of the Feldman plan or Senate Bill 10 may be made on the basis of such election data in isolation from the incumbent's constituency and personality, it is apparent that Intervenors mischaracterize the import of the aggregated election data upon which they rely. First, Intervenors count as an hypothetical Republican "win" any district in which there is a projected Republican plurality, regardless of the size of the hypothetical margin. See Affidavit of Thomas E. Mann, ¶10. However, it is recognized that districts in which there is a plurality of fewer than 55% should be characterized as "swing" districts (Zimmer at T46-10 to 20).

Moreover, analysis of the aggregated election data not relied upon by Intervenors in fact reveals that Intervenors' purported demonstration of "fairness" relies only on the three races which produce the largest number of Republican "wins" under their extremely forgiving criteria for hypothetical "victory." Thus, for example, the 1978 United State Senate results project only one reliable Republican victory to ten solid Democratic wins, while the 1978 congressional figures project only three reliable Republican

"wins" to seven solid Democratic victories. Similarly, the 1980 United States Senate results produce only three Republican Districts but yield six solidly Democratic ones. Ibid. It is therefore apparent, even if one accepts Intervenors' premise that aggregated election data are relevant, that the Feldman plan can in no way be considered "fair."

Moreover, as argued above, since the distorted districts which the Feldman plan establishes do not otherwise serve any identifiable public purpose this court must conclude that Senate Bill 10 which is based upon it "is either totally irrational or entirely motivated by a desire to curtail the political strength with the affected political group." Karcher v. Daggett, supra, 103 S.Ct. at 2675 (Stevens, J., concurring). Insofar as the Feldman plan succeeded with its invidious political purpose it is the latter; insofar as it failed in those objectives, it is the former.

Regardless of which characterization this court considers more appropriate, this conclusion requires, under White v. Weiser, that Senate Bill 10 be accorded no special deference by this court as the progeny of that tainted legislative enactment. In light of the further fact that another plan is before this court which contains lower population deviation figures, the "stricter" standards applicable to court formulated reapportionment plans this court should, in the exercise of its equitable discretion, reject Senate Bill 10 as a basis for establishing a congressional reapportionment plan for the State of New Jersey.

CONCLUSION

For the foregoing reasons, this court should reject Senate Bill 10 as the basis for the establishment of a congressional reapportionment plan for the State of New Jersey.

Respectfully submitted,

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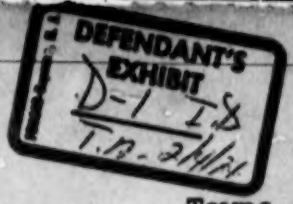

Towns Removed from the 9th District Under Feldman from Cahill	1980 Congressional
Rockleigh (Bergen)	-55
Northvale (Bergen)	-655
Cresskill (Bergen)	-1056
Demarest (Bergen)	-972
Closter (Bergen)	-1530
Haworth (Bergen)	-747
River Edge (Bergen)	-1934
Harrington Park (Bergen)	-948
Old Tappan (Bergen)	-936
River Vale (Bergen)	-1513
Park Ridge (Bergen)	-1294
Palisades Park (Bergen)	-1933
Ridgefield (Bergen)	-1455
Little Ferry (Bergen)	-829
North Bergen (Hudson)	-3599
Secaucus (Hudson)	-2455
Union City (Hudson)	-1311
Lyndhurst (Bergen)	1214
Total	- 22,008

Towns Added to the 9th District Under Feldman from Cahill	1980 Congressional
Woodcliff (Bergen)	-65
Hillsdale (Bergen)	-325
Washington (Bergen)	-339
Westwood (Bergen)	-407
Emerson (Bergen)	-88
Paramus (Bergen)	920
Glen Rock (Bergen)	-309
Fair Lawn (Bergen)	3097
Elmwood Park (Bergen)	303
Saddle Brook (Bergen)	-184
Rochelle Park (Bergen)	-359
Maywood (Bergen)	-497
Hackensack (Bergen)	1768
Lodi (Bergen)	342
South Hackensack (Bergen)	-152
Hasbrouck Heights (Bergen)	-1167
Woodridge (Bergen)	-142
Bogota (Bergen)	-364
Ridgefield Park (Bergen)	-243
Total	+1,789

Towns Removed from the 9th District Under Lynch from Feldman	1982 Congressional
Bogatar (Bergen)	-162
Carlstadt (Bergen)	-449
East Rutherford (Bergen)	-232
Emerson (Bergen)	-85
Hillsdale (Bergen)	-478
Norwood (Bergen)	-351
Ridgefield Park (Bergen)	-221
Rutherford (Bergen)	-1072
Teterboro (Bergen)	-10
Washington (Bergen)	-410
Westwood (Bergen)	-565
Woodcliff Lake (Bergen)	-175
Total	-4,210

Towns Placed in the 9th District Under Lynch from Feldman	1982 Congressional
Closter (Bergen)	-972
Cresskill (Bergen)	-436
Northvale (Bergen)	-276
Oradell (Bergen)	-1626
Palisades Park (Bergen)	564
River Edge (Bergen)	-939
Rockleigh (Bergen)	-25
North Bergen (Hudson)	6398
Total	+2,688